which was clearly dominant, and that the gift over was therefore repugnant and void. *Young* v. *Robinson*, 99 S. W. Rep. 20 (K. C. Ct. App.). There is in the nature of things nothing irreconcilable about giving property to one person, and what remains at his death to another. Talk about repugnancy, common with American courts, only befogs real objections.[6] The testator here directed that, if any of the money were left at his brother's death, the nieces should have it, — a perfectly rational contingency. Only a casuist could argue that, because all was left, the contingency was not satisfied. Ordinarily a collateral rule of law would defeat the gift over, either because unlawfully derogating from a preceding gift, or because, as so often alleged, repugnant to it. But here is no longer any interest from which there can be derogation or to which there can be repugnance. The problem is somewhat complicated by a residuary clause, and another directing that the shares of those who should die before receiving them should fall into the residue. The latter clause would seem naturally to provide only against a lapse in the residue, for specific legacies would fall into it anyhow;[10] but the court construed it to refer to both. The true result is not thereby changed, for it must be read as a provision of lapse only. Where a specific legacy is given to two persons in succession, the death which shall throw the whole into the residue must be taken to be that of the last person in the series entitled.[11]

LIABILITY OF A SURETY AFTER PAYMENT BY AN INSOLVENT DEBTOR HAS BEEN RECOVERED BY HIS TRUSTEE IN BANKRUPTCY. — The cases are in conflict whether the payee of a note, who has been compelled to surrender a payment as a fraudulent preference, can still hold the sureties. A recent case holds that he may, though having known of the debtor's insolvency. *Hooker* v. *Blount*, 97 S. W. Rep. 1083 (Tex., Civ. App.). An objection which may be urged at the outset is that the note has been paid and the surety parties thereby discharged. It has, however, often been held that an invalid payment does not release the surety, even though the note may have been cancelled in consequence.[1] The strongest reason for giving the surety a defense is that his right of subrogation has for a time been tied up, and consequently his risk increased. But this is a defense which rests upon equitable grounds and should be allowed only when it will do equity. Holding the surety discharged places the creditor in a peculiarly difficult situation. If he accepts a payment which afterwards he is obliged to refund as a fraudulent preference because of bankruptcy within four months, his rights against the sureties are gone. And yet the same result follows if he refuses to accept a payment tendered at maturity and bankruptcy does not follow.[2] In short, the only case where his remedy would be preserved against the surety is where payment is refused and bankruptcy does follow within the four months. The almost impossible task of determining the outcome of the debtor's financial situation should not in this way be imposed upon the creditor. An English case has held that when a creditor has innocently received a preference which he must pay back, he may still

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10 Bagwell *v.* Dry, 1 P. Wms. 700. 11 Morton *v.* Barrett, 22 Me 257.

1 Williams *v.* Gilchrist, 11 N. H. 535; West Phila. Nat'l Bank *v.* Field, 143 Pa. St. 473. See also 17 HARV. L. REV. 205.

2 Smith *v.* Old Dominion Bldg. & Loan Ass'n, 119 N. C. 257; Second Nat'l Bank *v.* Prewett, 96 S. W. Rep. 334 (Tenn.).

hold the surety.[3] The same result should follow when payment is received with knowledge of insolvency, because even so the creditor is unable to determine until after the bankruptcy of his debtor whether he may be allowed to keep the payment so made. Under the Bankruptcy Act of 1898 [4] a preference, even though innocently received, could not be retained by the creditor desiring to prove in bankruptcy;[5] and here giving a defense to the surety after surrender of such a payment worked an especially harsh result. Under the Act as amended in 1903,[6] proof is allowed if a preference, innocently received, is retained. Nevertheless, for the reasons given, the creditor should still have his right against the surety, irrespective of his knowledge of the insolvency.

A more difficult question arises when the creditor, after the adjudication in bankruptcy, refuses to surrender a preference voluntarily, but is later compelled to do so. Here it may with some force be said that the creditor has wilfully endangered the subrogation. It may be, however, that he is in doubt whether the payment can be avoided by the trustee, and desires to test that right in a judicial tribunal. Such a course, which may, if the creditor is successful, enure to the surety's benefit, should not be the means of affording the latter a defense. This result is in accord with the reasoning of the United States Supreme Court, which has held that the surrender of a preference does not have to be voluntary in order to entitle the creditor to prove in bankruptcy.[7] An interesting solution of the general question, suggested in one case, is for the creditor to notify the surety of the facts, and then if the latter does not advise a course to pursue, the creditor may proceed and receive the payment without prejudice.[8] This is a practical rule, but there seems no need to quarrel with the result of the present authority, which, as in the principal case, permits the creditor to take reasonable measures on his own initiative.[9]

NECESSITY OF NOTICE TO A GUARANTOR OF ACCEPTANCE AND DEFAULT. — How far notice of acceptance and default is necessary in order that the creditor may hold the guarantor is a troublesome question in the law of guaranty upon which the cases are hopelessly irreconcilable. As to notice of acceptance the first inquiry is whether it is always, as some courts hold,[1] an essential element in the formation of the contract of guaranty. A distinction between bilateral and unilateral contracts must be made. In a bilateral contract the consideration for the offer is a counter-promise, which until communicated has no legal effect. Here the notice in the form of an

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[3] Petty *v.* Cooke, L. R. 6 Q. B. 790.
[4] § 57 *g*.
[5] Pirie *v.* Chicago Title & Trust Co., 182 U. S. 438.
[6] § 12.
[7] Keppel *v.* Tiffin Savings Bank, 197 U. S. 356.
[8] Northern Bank of Kentucky *v.* Cooke, 13 Bush (Ky.) 340.
[9] Second Nat'l Bank *v.* Prewett, *supra*; Swarts *v.* Fourth Nat'l Bank of St. Louis, 117 Fed. Rep. 1; Watson *v.* Poague, 42 Ia. 582; Harner *v.* Batdorf, 35 Oh. St. 113; Northern Bank of Ky. *v.* Farmers' Nat'l Bank of Cynthiana, 23 Ky. L. Rep. 696. *Contra*, *In re* Ayers, 6 Biss. (U. S.) 48. And see Bartholow *v.* Bean, 18 Wall. (U. S.) 635, 642; *In re* Harpke, 116 Fed. Rep. 295, 298.

[1] Davis *v.* Wells, 104 U. S. 159; Winnebago Paper Mills Co. *v.* Travis, 56 Minn. 480.